In the Supreme Court of the United States

OCTOBER TERM, 1967

DR. WILLIAM ORLANDO DUGGAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Argument	10
Conclusion	12
Cases:	
Abel v. *United States*, 362 U.S. 217	11
Beck v. *Washington*, 369 U.S. 541	10
Bruton v. *United States*, No. 705, October Term, 1967, decided May 20 1968	1, 10
Escobedo v. *Illinois*, 378 U.S. 478	2, 11
Johnson v. *New Jersey*, 384 U.S. 719	11
Lopez v. *United States*, 373 U.S. 427	11
Rugendorf v. *United States*, 376 U.S. 528	11
Singer v. *United States*, 380 U.S. 24	11
Statutes:	
18 U.S.C. 371	3
18 U.S.C. 1952	2, 3
18 U.S.C. 4208(a)(2)	3

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1428

DR. WILLIAM ORLANDO DUGGAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 391 F. 2d 433.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1968. A petition for rehearing was denied on April 12, 1968. The petition for a writ of certiorari was filed on May 13, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the decision in *Bruton* v. *United States*, requires reversal of petitioner's conviction.

2. Whether petitioner was properly advised of his

309-921—68

rights, pursuant to the requirements of *Escobedo* v. *Illinois*, 378 U.S. 478.

STATUTE INVOLVED

18 U.S.C. 1952 (a) and (b) provides as follows:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means

(1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or

(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner and three co-defendants were convicted of conspiracy to travel in interstate commerce, with intent to promote the carrying on of unlawful activities, to wit, bribery and gambling, in violation of 18 U.S.C. 371 and 1952.[1] Petitioner was sentenced to imprisonment for three years, to be eligible for parole at such time as the Board of Parole might determine, pursuant to 18 U.S.C. 4208(a)(2) (1 F. 1–9); 2 F. 52).[2] The court of appeals affirmed (Pet. App. A).

1. The evidence on behalf of the government showed a plan whereby petitioner and others would travel in interstate commerce from Detroit, Michigan, to Wichita, Kansas, for two purposes: (1) gambling in violation of Kansas law, and (2) bribery, to gain official protection for the gambling and for an abortion ring which was to be set up. Other participants in the plan were co-defendants Dillon, an investigator in the Kansas Attorney General's office; Harwoods or Horowitz, a convicted abortionist (who died before trial); Bartello, described as "high up" in the "organization" in Detroit; and Endicott, who operated under the facade of the Raven Oil Company, a corporation whose charter had expired.

[1] Petitioner was acquitted of the substantive offenses of interstate travel.

[2] "1 F." and "2 F." refer to the folders which petitioner has labeled "File #1" and "File #2". The papers therein are not consecutively numbered. The indictment ("1 F. 1–9") is to be found at the back of File #1.

In July 1964, in Eldorado, Kansas, Harwoods, Endicott and Dillon visited a chiropractor named Darling who described his business as "menstrual difficulties". They told him that they wanted to take over his operation (Tr. 181–183). Darling was to refer his abortion cases but continue to receive his regular fee (Tr. 186–189). A number of meetings ensued, at one of which petitioner was present. Petitioner at that time discussed the methods to be used in abortion and also discussed gambling (Tr. 196–216). Harwoods told Darling that petitioner was to act if complications should arise with respect to any of their patients (Tr. 222). They discussed plans to extend their operation to obtain business from Oklahoma and Colorado (Tr. 223). Two physicians and a drug salesman were approached by Dillon, Harwoods or Endicott to send abortions to a clinic being set up in Wichita (Tr. 270–272, 282–286, 288–293, 302–308). Endicott told the drug salesman that the enterprise was a syndicate which operated in Detroit and other cities (Tr. 1014, 1018, 1029, 1043). He said that the operation was protected by the police and by someone in the Kansas Attorney General's office (Tr. 1017). A woman testified to an unsuccessful attempt at abortion in August 1964 by Harwoods, to whom she had been referred by Darling (Tr. 993–1006, 216). Harwoods told her they were moving their office to Wichita from Detroit and that he had a doctor to go with her if she had to go the hospital (Tr. 1001, 1004).

Lieutenant Stout of the Wichita Police Department was sergeant of the Vice Division in August 1964 under Lieutenant Doggett, who was deceased at the

time of the trial. On August 11, 1964, he was contacted by Dillon, who said he had some friends in town who were connected with bingo. Stout reported the matter to his superior. Subject to pre-arranged surveillance, Stout and Doggett met Dillon and Harwoods (Tr. 518–520, 531), who offered the officers a thousand dollars a month each for protection in their planned operations. Harwoods said that he had performed numerous abortions and discussed the method he used. The bingo games were to be fixed, so that accomplices would receive the big prizes (Tr. 520–546). When "things started rolling well," it was planned to bring in the numbers game (Tr. 547–548).[3]

On September 22, 1964, petitioner, Harwoods and Bartello left Detroit in two cars, heading west (Tr. 693–698). On the following day, a federal warrant for their arrest, and state search warrants for the two vehicles, were issued (Tr. 722). At 5:30 p.m., local police officers stopped the first of the two vehicles to arrive within the city limits, executed the warrant for its search and arrested petitioner and Bartello under local ordinance on a vagrancy charge for unlawful calling (Tr. 717–723, 740). A few minutes later, the second vehicle arrived at the same point, was stopped and searched. Harwoods, the driver was also arrested (Tr. 724–725). No property was seized from the first vehicle, but a quantity of bingo equipment

[3] Surveillance of these meetings was testified to by Captain Hannon, who also received reports from the officers (Tr. 650–660). Testimony was also given as to arrangements for the leasing of quarters for the bingo games (Tr. 166–173, 364–380) and as to hotel records covering various meetings and telephone calls of the parties (Tr. 404–407, 424–443, 452–454).

and medical instruments and supplies suitable for use in abortions were seized from the second vehicle (Tr. 724–727, 908–909, 932–937, 943–946). Dillon was apprehended between 5:30 and 5:45 p.m. At 6:05 p.m., FBI agent Fletcher tried to locate the United States Commissioner. When found, the Commissioner went to police headquarters, arriving there at approximately 10:30 p.m. (Tr. 842–844).

2. Petitioner, a physician and surgeon specializing in gynecology and obstetrics, testified he had accepted an invitation of Harwoods to drive to Wichita with him and Bartello because he wanted to find out if Raven Oil Company was a good investment, to apply for a Kansas medical license, and to turn in his application for employment at McConnell Air Force Base (Tr. 1444–1445). He admitted being with other defendants during negotiations for renting a building for mammoth bingo games. He also admitted that he was at Darling's office in El Dorado. He recalled going to a printer at El Dorado and explaining to him the printing of certain lottery tickets (Tr. 1532–1535). He did not recall discussing setting up a numbers game in Wichita. He said he knew nothing of a plan to commit abortions (Tr. 1536, 1539). Petitioner was asked on cross-examination about statements made to FBI agents after his arrest (Tr. 1535–1537, 1552, 1553, 1558, 1559). An FBI agent also testified to such statements in which petitioner admitted giving advice as to printing tickets for a type of lottery operation, and said that he had learned from Jack Harwoods' brother that Harwoods had been involved in abortions (Tr. 1755–1759).

Before petitioner was permitted to answer any questions on cross-examination regarding his statement, a hearing was held outside the presence of the jury. FBI agent Kellerman testified that, after advising petitioner of his rights,[4] he interviewed him at police headquarters on the evening of September 23, 1964, from about 9:25 p.m. until his arraignment at about 10:30 p.m. On the following morning, after again advising him as to his rights, Kellerman interviewed petitioner from approximately 10:45 until 12:00 noon and again from 1:45 until about 2:30 p.m., another officer being present during most of the interview (Tr. 1497–1499). Petitioner said that he had an attorney, but had not consulted him. Petitioner made no request that he be allowed to contact an attorney (Tr. 1501–1502). In the afternoon of the 24th an attorney named Foster arrived and conferred with petitioner, after which the interview was discontinued (Tr. 1503–1504).

Petitioner testified that he told the Wichita police repeatedly that he wanted to make a telephone call. He made no claim that he mentioned this to Kellerman (Tr. 1511). He was arraigned late on the night of the 23rd. He had no sleep or food during this time (Tr. 1513). Mr. McRae, whom he saw at the arraignment, refused to represent him because of his representation of other defendants (Tr. 1514).

[4] Kellerman stated, "I advised Dr. Duggar that federal charges were outstanding against him and that he did not have to talk to me. That anything he did tell me could be used in court against him and that he could consult an attorney or anyone else before talking with me. And that if he could not afford an attorney, the court would appoint one for him" (Tr. 1496).

The court overruled petitioner's objection, pointing out that petitioner had never denied that he was advised of his rights. The court found that there had been no undue delay in arraignment (Tr. 1516–1517, 1528).

3. Dillon was interviewed by the FBI at police headquarters beginning at 6:17 p.m. (Tr. 827). He was informed of his rights to remain silent and to an attorney. Dillon said that in July 1964 Endicott and Harwoods came to his home and inquired about Kansas law relating to bingo and abortions. A few weeks later, Harwoods asked his help in locating quarters for a bingo game and an office suite to be used for abortions. Later Harwoods and petitioner came from Detroit and discussed gambling and abortions. Harwoods told Dillon that petitioner was his "medical connection, as far as the abortions were concerned." On a subsequent trip, Harwoods had inquired as to who in the area performed abortions. The three men visited Darling in El Dorado. The balance of the statement made no reference to petitioner (Tr. 1085–1093).

When this statement was introduced during the government's case in chief, petitioner's co-defendants objected on the grounds that Dillon's original arrest was illegal and any statements made thereafter were therefore inadmissible and that the charge of vagrancy was deceptive and misleading (Tr. 1078–1079). Petitioner adopted these objections and added that the evidence did not connect him with the alleged conspiracy (Tr. 1080). The court, upon its own initiative, then instructed the jury that the statements of Dillon

about to be related were made after the termination of any conspiracy and therefore binding only upon him and not upon the other defendants. Asked whether this cleared the position of everyone, petitioner's counsel responded affirmatively (Tr. 1083–1085). After the agent testified to what Dillon had said, opportunity for further objections to the written statement was given in the absence of the jury, but all parties stood on their previous objections (Tr. 1093–1095).

Dillon testified extensively (Tr. 1166–1172, 1188–1249). He denied the accuracy of the statement (*supra,* p. 8) which he signed shortly after his arrest (Tr. 1249–1252). On rebuttal, FBI agent Ruiz testified that on the morning of September 24, 1964, he and police officer Triplett went to Dillon's home. Ruiz told Dillon that he would like to review Dillon's signed statement of the previous day, but that Dillon did not have to talk with him, anything said could be used against him and he had the right to contact an attorney (Tr. 1785–1786). Petitioner's co-defendants objected on the grounds that Dillon then had counsel and had been arraigned. Petitioner objected that the conspiracy had ended. The court said that it had already instructed in that regard, to which petitioner's counsel responded that he "just wanted to go on the record" (Tr. 1786–1790). The objections were overruled. Ruiz testified that Dillon said his statement was all true (Tr. 1790–1802).

ARGUMENT

1. Petitioner argues that, since Dillon's statement mentioned him by name, his conviction must be reversed even though the court instructed the jury to consider the statement only against Dillon. See *Bruton* v. *United States,* No. 705, this Term, decided May 20, 1968. In our view, this claim does not require further review by this Court, or remand to the court of appeals.

Although there was a motion to sever before trial, there was no contention then or at the trial that the admission of Dillon's statement, with the limiting instructions then considered sufficient, prejudiced petitioner. There was no request to have petitioner's name deleted. The references to petitioner in Dillon's statement were to the effect that petitioner was with Harwoods when they discussed bingo and abortions; that petitioner was the medical connection Harwoods mentioned and that the three men visited Dr. Darling. Dr. Darling had already testified that petitioner was at a meeting where Harwoods said petitioner was to act if medical complications arose, and that petitioner also discussed gambling. See *supra,* p. 4. Thus, Dillon's statement injected no new information into the case. Moreover, Dillon was a witness and could have been cross-examined by petitioner as to his extra-judicial statements. Thus, there was no denial of a right to confrontation under the Sixth Amendment, the basic consideration for the Court's ruling in *Bruton.* In view of the facts of this case and petitioner's failure to raise the contention at trial, there is no occasion to set aside the conviction. *Beck* v. *Washing-*

ton, 369 U.S. 541, 549–550; *Abel* v. *United States,* 362 U.S. 217, 230; *Rugendorf* v. *United States,* 376 U.S. 528, 534; *Singer* v. *United States,* 380 U.S. 24, 38; *Lopez* v. *United States,* 373 U.S. 427, 436.

2. It was proper to impeach petitioner's testimony by cross-examination and proof of contradictory statements made by him after arrest. When that cross-examination commenced, the court correctly halted it until a proper foundation was laid. Outside the hearing of the jury, agent Kellerman testified as to the warning given petitioner at the beginning of the interview (*supra,* p. 7, n. 4). This warning manifestly complied with the requirements of *Escobedo* v. *Illinois,* 378 U.S. 478.[5] Whether the investigation was accusatorial was therefore immaterial; the fact is that petitioner was not denied the opportunity to consult with his attorney. All that petitioner claimed was that he made requests to jail personnel, both before and after the interview, to make a long distance call to his home in Detroit, but was told that such a request had to be put in writing to the sheriff. Significantly, no request of any kind was claimed to have been made to the interviewing officer. The court properly credited the definite testimony of the FBI agent, which petitioner did not deny, that petitioner had been advised of his right to consult with his attorney before answering any questions.

[5] The trial began on November 8, 1965, and so was governed by this case. *Johnson* v. *New Jersey,* 384 U.S. 719.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JUNE 1968.

U. S. GOVERNMENT PRINTING OFFICE, 1968